APPEAL NO. 022804
FILED DECEMBER 27, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on October 9, 2002. The hearing officer resolved the disputed issues by deciding the following: (1) that the compensable injury of _____, does extend to and include a minor cervical sprain, but it does not extend to include the diagnosed disk herniations at C4/5, C5/6, and C6/7 with neural foraminal narrowing; (2) that respondent 2/cross-appellant (carrier) is not relieved from liability because of the appellant/cross-respondent's (claimant) failure to timely notify her employer of an injury; (3) that the carrier is not relieved from liability because of respondent 1's (sub-claimant) failure to timely file a claim for compensation with the Texas Workers' Compensation Commission (Commission) within one year of the injury; (4) that the claimant did not have disability as a result of the claimed injury prior to the date of the CCH; and (5) that the claimant did not show that she was entitled to change treating doctors to Dr. W, but the carrier did not timely dispute the Commission's approval of change of treating doctor.

The claimant appeals, disputing the adverse extent of injury and disability determinations. The carrier responds, urging affirmance. The carrier appeals, disputing the determination that the carrier did not timely dispute the Commission's approval of the change of treating doctors from Dr. C to Dr. W and the determination that the carrier is not relieved from liability because of the sub-claimant's failure to timely file a claim for compensation with the Commission within one year. The appeal file does not contain a response from the sub-claimant to either the appeal or cross-appeal.

DECISION

Affirmed.

EXTENT OF INJURY AND DISABILITY

The claimant contends that the hearing officer exhibited bias which affected his role as an objective fact finder in rendering his decision. The record does not reveal hearing officer bias and we perceive no reversible error.

It was undisputed that the claimant sustained a compensable injury on _____, when she was struck in the head by a metal frame which was part of a store display. Extent of injury and disability are factual questions for the fact finder to resolve. The hearing officer, as finder of fact, is the sole judge of the relevance and materiality of the evidence as well as the weight and credibility that is to be given to the evidence. Section 410.165(a). Conflicting evidence was provided on these issues. It is for the hearing officer to resolve the inconsistencies and conflicts in the evidence. Garza v. Commercial Insurance Company of Newark, New Jersey, 508 S.W.2d 701

(Tex. Civ. App.-Amarillo 1974, no writ). This is equally true of medical evidence. Texas Employers Insurance Association v. Campos, 666 S.W.2d 286, 290 (Tex. App.-Houston [14th Dist.] 1984, no writ). The trier of fact may believe all, part, or none of the testimony of any witness, including the claimant. Aetna Insurance Company v. English, 204 S.W.2d 850 (Tex. Civ. App.-Fort Worth 1947, no writ). The evidence supports the hearing officer's factual determinations regarding extent of injury and disability. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and we do not find them to be so in this case. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

TIMELY DISPUTE OF CHANGE OF TREATING DOCTORS

The issue reported from the benefit review conference (BRC) was: Is the claimant entitled to change treating doctors to Dr. W pursuant to Section 408.022? As the Appeals Panel recently clarified in Texas Workers' Compensation Commission Appeal No. 020022, decided February 14, 2002, an issue stated like the one in this case is broader than whether the particular Commission employee who approved the change abused his or her discretion. Evidence may be presented and considered in addition to what was stated on the Employee's Request to Change Treating Doctors (TWCC-53). The hearing officer must evaluate whether a change should be allowed in accordance with the standards set forth in Section 408.022 and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 126.9 (Rule 126.9). Texas Workers' Compensation Commission Appeal No. 020007, decided February 21, 2002.

Although the claimant did not specifically appeal any portion of the hearing officer's determination regarding her entitlement to change treating doctors, she noted in her appeal that the Commission guidelines allow a patient to change treating doctors if they are not receiving adequate medical care and the claimant was "not examined, diagnosed or treated correctly until she came to [her attorney's] office looking for answers and direction for her injuries." Section 408.022 deals with the selection of a doctor and circumstances under which a treating doctor may be changed. *See also* Rule 126.9. Section 408.022(d) provides that a "change of doctor may not be made to secure a new impairment rating or medical report." The hearing officer noted in his statement of the evidence that the claimant "went shopping for a new diagnosis and a doctor who would take her off work." The hearing officer is the sole judge of the weight and credibility that is to be given to the evidence. Section 410.165(a). The hearing officer reviewed the record and decided what facts were established. There was sufficient evidence for the hearing officer to find that the claimant did not properly show that she was entitled to change treating doctors from Dr. C to Dr. W.

We next address the issue of whether the hearing officer erred in determining that the carrier did not timely dispute the Commission's approval of the change of treating doctors from Dr. C to Dr. W. The carrier argues on appeal that this was not an issue before the hearing officer at the CCH. The claimant's position at the BRC was

reported as being "the carrier has waived the right to dispute the change." Additionally, the last sentence of the recommendation from the BRC regarding payment or denial of benefits was "the carrier failed to timely dispute the request to change to an alternate doctor as it did not dispute the change within 10 days as required pursuant to Rule 126.9(g)."

In Texas Workers' Compensation Commission Appeal No. 971957, decided November 3, 1997, the Appeals Panel wrote:

> The carrier asserts that there is no 10 day or other time requirement to dispute a change of treating doctor contained in Rule 126.9(g), nor is there any requirement that it be in writing. While it is true that Rule 126.9(g) does not specifically state a writing is required, the rule does specifically provide a 10-day time frame and states that "[T]hat dispute will be handled through the dispute resolution process . . . ." Clearly, the dispute resolution process as set forth in Section 410.021 and Rule 141.1 provides that a BRC is the initial vehicle to mediate and possibly resolve disputed issues and that a request for a BRC shall be made on a form [Request for Benefit Review Conference] (TWCC-45). Rule 102.7 mandates that a request to be considered timely must be received on or before the last permissible day of filing. That requirement was not met here. As was held in Texas Workers' Compensation Commission Appeal No. 951264, decided September 8, 1995, a case concerning the timely filing of a request for a BRC in a supplemental income benefits case, the request had to be received by the Commission within 10 days and not just mailed within 10 days. *See also* Texas Workers' Compensation Commission Appeal No. 962426, decided January 8, 1997.

We will reverse a factual determination of a hearing officer only if that determination is so against the great weight and preponderance of the evidence as to be clearly wrong and manifestly unjust. Cain, *supra*; Pool, *supra*. Applying this standard of review to the record of this case, we find there is sufficient evidence in the record to support the hearing officer's determination that the carrier did not timely dispute the Commission's approval of the request to change treating doctors.

SUB-CLAIMANT'S TIMELY FILING OF A CLAIM

The carrier argues that the hearing officer erred in finding and concluding that the carrier is not relieved from liability under Section 409.004 because of the sub-claimant's failure to timely file a claim for compensation within one year of the injury. There was sufficient evidence to support the hearing officer's determination that it timely filed claims for reimbursement with the carrier. The carrier's argument that the filing of a claim must be within a year of the injury is without merit. It is possible that the medical service for which reimbursement is sought was not provided until a year or more after the injury. The determination that the carrier is not relieved of liability because of the

sub-claimant's failure to timely file a claim for compensation with the Commission within one year of the injury is affirmed.

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **FIDELITY AND GUARANTY INSURANCE COMPANY** and the name and address of its registered agent for service of process is

JOHN D. PRINGLE
807 BRAZOS, SUITE 603
AUSTIN, TEXAS 78701.

_____
Margaret L. Turner
Appeals Judge

CONCUR:

_____
Thomas A. Knapp
Appeals Judge

_____
Edward Vilano
Appeals Judge